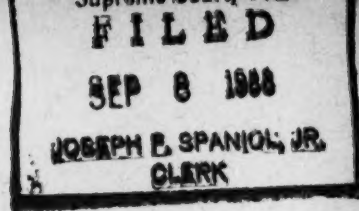


(2)  
No. 88-14



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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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**HECTOR L. TOLEDO, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF MILITARY APPEALS**

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**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

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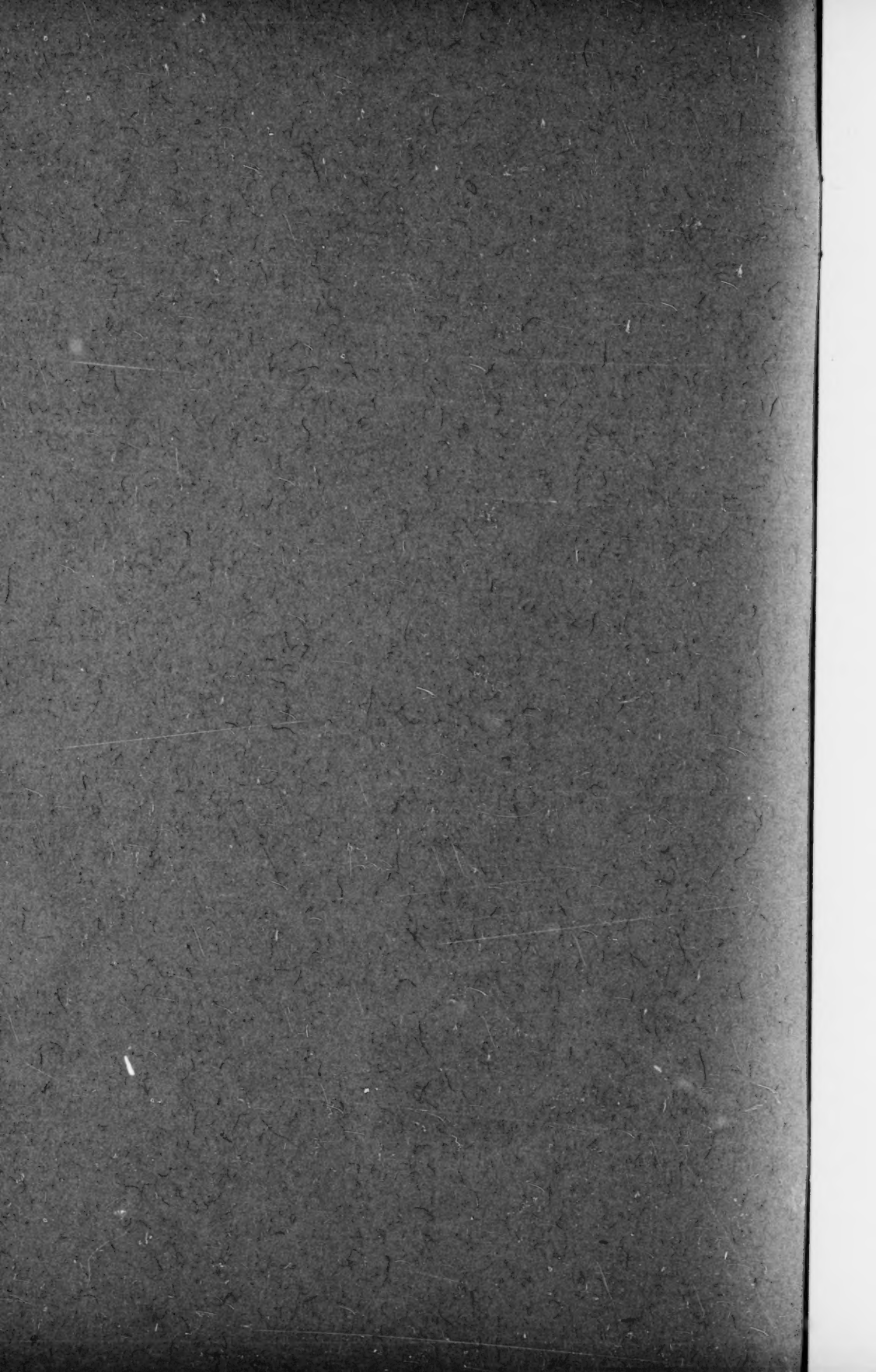
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## **QUESTION PRESENTED**

Whether the admission at trial of statements petitioner made to a military psychologist violated petitioner's Sixth Amendment right to the assistance of counsel.



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## **OPINIONS BELOW**

The opinion of the Court of Military Appeals (Pet. App. 1a-16a) is reported at 25 M.J. 270. The opinion of the Court of Military Appeals on reconsideration (Pet. App. 17a-20a) is reported at 26 M.J. 104. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 21a-26a) is unreported.

## **JURISDICTION**

The judgment of the Court of Military Appeals was entered on December 14, 1987, and was reaffirmed on reconsideration on May 9, 1988. The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

## STATEMENT

Petitioner, a member of the United States Navy, was tried by a general court-martial sitting in Yokosuka, Japan. He was convicted of rape, indecent assault, and committing indecent acts upon a female under the age of 16, in violation of Articles 120 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 934.<sup>1</sup> Petitioner was sentenced to confinement for 30 years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings but reduced the period of confinement to 20 years and otherwise approved the sentence. The Navy-Marine Corps Court of Military Review reduced petitioner's conviction for rape to the lesser included offense of committing indecent acts upon a child under the age of 16, a violation of Art. 134, UCMJ, 10 U.S.C. 934. The court also reassessed the sentence and reduced the period of confinement to 15 years but otherwise affirmed the findings and sentence (Pet. App. 21a-26a). The Court of Military Appeals affirmed (*id.* at 1a-16a).

1. In November 1983, petitioner arrived in Misawa, Japan. Petitioner was befriended by Petty Officer Arnardo Serrano, and petitioner soon became a regular visitor at the Serrano home, where he often played with the Serranos' three children. On November 6, 1984, petitioner went to the Serranos' home and spent the early portion of the evening playing with the children. When the children's bedtime approached, petitioner insisted on bathing and putting the children to bed himself while Petty Officer Serrano remained downstairs to repair some video equipment. Mrs. Serrano was out for the evening. Tr. 91-94. While he was alone with Kristy Serrano, the Serranos' five-

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<sup>1</sup> Petitioner was acquitted of sodomy, in violation of Art. 125, UCMJ, 10 U.S.C. 925.

year-old daughter, petitioner touched Kristy's vagina and buttocks with his penis, and he fondled her vagina (Tr. 129, 132-134).<sup>2</sup>

After a while, Serrano went up to check on the children (Tr. 95). When Serrano looked into Kristy's bedroom, he saw that she was sitting on the edge of the bed with her nightgown hiked up and her panties pulled down (Tr. 96). Petitioner was standing in front of her, facing her, with his pants unfastened and open in front (*ibid.*). He was holding his hands in front of him and his underwear was pulled down slightly (Tr. 97-98). A large semen stain was later found on petitioner's underwear (Tr. 258-259). When Serrano angrily burst into the room, petitioner turned away and walked toward the corner. Petitioner fastened his pants as he went, and he remained silent when Serrano demanded to know what was going on (Tr. 96-98, 284). As petitioner turned to leave the room, still fastening his pants, Serrano noticed that petitioner was drenched with sweat even though it was a cold evening (Tr. 99). After ordering petitioner out of his home, Serrano called the military police, who apprehended petitioner later that evening.

2. Petitioner testified in his own defense and denied any wrongdoing (Tr. 275, 278). His explanation for the events in Kristy's bedroom was that Kristy had been complaining of vaginal itching, and he wanted to see the affected area before informing Petty Officer Serrano (Tr. 275). Petitioner admitted that he had touched Kristy's vagina, but he claimed that he did so only to determine if

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<sup>2</sup> Kristy testified about the events of that evening at a videotaped deposition that was admitted at trial. Kristy testified that petitioner molested her twice on the night of November 6, 1984, and on one other occasion during the preceding year when petitioner took her to his barracks room (Tr. 130-132).

she was really in pain (Tr. 288). Petitioner claimed that the semen stain on his underwear resulted from sexual intercourse he had later that evening with a local Japanese woman (Tr. 286).<sup>3</sup>

In rebuttal, the prosecution called Dr. Paul Rosete, a clinical psychologist and a captain in the United States Air Force who was stationed at the Misawa Air Base and who had examined petitioner before trial (Tr. 298). The prosecutor sought to call Dr. Rosete for two reasons: (1) to offer Dr. Rosete's opinion about petitioner's veracity, and (2) to rebut petitioner's claim about the origin of the semen stain on his underwear (Tr. 295-296). The defense objected to Dr. Rosete's testimony on the ground that it was unduly prejudicial under Mil. R. Evid. 403, and on the ground that it was privileged under Rule 706 of the Rules for Courts-Martial, *Manual for Courts-Martial, United States—1984 (Manual)* (Tr. 296-297).<sup>4</sup> Defense counsel

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<sup>3</sup> Petitioner testified that his underwear was around his ankles at the time that he had intercourse with the woman (Tr. 289). Petitioner did not call the woman he allegedly saw that evening to testify.

<sup>4</sup> Rule 706 provides in relevant part:

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

\* \* \* \* \*

(c) *Inquiry.*

\* \* \* \* \*

(5) *Disclosure to trial counsel.* No person, other than the

stated that he had asked Dr. Rosete to conduct a confidential sanity evaluation of petitioner in order to determine whether the defense should request that a formal sanity board be convened to examine petitioner. Under those circumstances, defense counsel argued, it was improper for the prosecution to use Dr. Rosete as a witness against petitioner. Tr. 295-297.<sup>5</sup> The trial judge overruled the defense objection and permitted Dr. Rosete to testify only for the limited purposes stated by the prosecution (Tr. 297; Pet. App. 10a n.3).

Dr. Rosete testified that he interviewed petitioner for 10 to 12 hours, during which time petitioner discussed his sexual history (Tr. 299). According to Dr. Rosete, petitioner did not mention having sexual intercourse with a Japanese woman or anyone else on November 6 (Tr. 300; Pet. App.

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defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

<sup>5</sup> A "sanity board" is a panel that conducts a psychiatric examination of the accused to determine his competency to stand trial and his mental responsibility at the time of the offense. A sanity board may be ordered by the convening authority or trial judge sua sponte, or on the request of the prosecutor, defense counsel, or investigating officer, whenever there is reason to believe that the accused is incompetent to stand trial or was insane at the time of the alleged offense. Rule 706, *Manual*. In this case, defense counsel never asked the government or the trial judge to appoint Dr. Rosete to examine petitioner, nor did he request that Dr. Rosete be assigned to assist the defense (Tr. 295-296). Neither Rule 706 nor any Navy regulation requires an "initial evaluation" before a formal sanity evaluation. To the contrary, Rule 706(a) encourages defense counsel, among other listed individuals, to request a Rule 706 inquiry when there is reason to believe that the defendant lacked mental responsibility for any charged offense. There is no need for an initial evaluation from a psychologist as a prerequisite for a sanity board evaluation.

10a). Dr. Rosete also testified that, in his opinion, petitioner was "less than candid" during the interviews (Tr. 300).

2. The court of military review held that petitioner's statements to Dr. Rosete were not privileged, for two reasons. Pet. App. 23a. First, the court held that the Military Rules of Evidence do not recognize the physician-patient privilege. Mil. R. Evid. 501(d). Second, the court ruled that the privilege created by Mil. R. Evid. 302, which forbids the disclosure of the statements made by a defendant during a sanity board evaluation, was inapplicable in this case because no such examination was ever requested or conducted. Pet. App. 23a. The court also held that the trial court should not have admitted Dr. Rosete's opinion about petitioner's veracity, but it found that error harmless beyond a reasonable doubt. *Id.* at 24a.

3. The Court of Military Appeals affirmed for the reasons given by the court of military review. Pet. App. 11a-12a. The court noted that petitioner's statements to Dr. Rosete might have qualified under the attorney-client privilege recognized in Mil. R. Evid. 502(a) and (b)(3) if Dr. Rosete had been assigned to assist in petitioner's defense, but it held that that privilege was unavailable here, because Dr. Rosete was not so assigned. Pet. App. 12a-13a.

On reconsideration, the court reaffirmed its original ruling and stressed that statements made by a servicemember to a government psychiatrist are not privileged per se. A military defendant, the court stated, may not unilaterally add a government official to the defense team simply by consulting him for purposes related to the trial. Otherwise, a defendant "could arbitrarily commandeer a valuable government employee without appropriate considerations of availability, priority of missions, or otherwise." Pet. App. 19a-20a.

### ARGUMENT

Petitioner contends that the admission of his statements to Dr. Rosete violated his Sixth Amendment right to the assistance of counsel. Petitioner did not object at trial to the admission of his statements on that ground, however, and he has therefore waived that claim. See Mil. R. Evid. 103(a)(1) (defendant must specify the basis for his objection to evidence on pain of waiver). In any event, petitioner's claim would not warrant review by this Court even if it had been preserved.

To support his Sixth Amendment claim, petitioner relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the Court held that when an indigent defendant demonstrates that his sanity will be a significant factor at trial, the government must ensure that the defendant has access to a psychiatrist to conduct an appropriate examination of the accused and to assist the accused in preparing and presenting a defense. Petitioner argues that by not treating the statements he made to Dr. Rosete as confidential, the military courts denied him the opportunity to consult with a mental health professional in order to decide whether to raise an insanity defense at trial. That argument is unpersuasive.

*Ake* did not prescribe a specific procedure to be followed in cases in which a defendant's mental responsibility may be an issue. Instead, the Court left it to the states and the federal government to decide how to implement a defendant's right. 470 U.S. at 83. Congress and the President have established procedures in military cases that fully satisfy the requirements of *Ake*. Those procedures guarantee any defendant the right to a medical expert provided by the government to assist in the preparation and presentation of his defense upon a showing of necessity, even in the absence of a showing of indigency. Rule

703(d), *Manual*;<sup>6</sup> 10 U.S.C. 846; Mil. R. Evid. 702; *United States v. Garries*, 22 M.J. 288, 290 (C.M.A.), cert. denied, 479 U.S. 985 (1986); *United States v. Mustafa*, 22 M.J. 165, 168-169 (C.M.A.), cert. denied, 479 U.S. 953 (1986). Moreover, as the Court of Military Appeals explained, when a defense expert is employed in accordance with Rule for Courts-Martial 703(d) or Mil. R. Evid. 706(c), the defendant's statements to that expert would qualify under the military attorney-client privilege. Mil. R. Evid. 502(a); Pet. App. 12a-13a. Finally, if a sanity board evaluation is ordered under Rule 706 of the Rules for Courts-Martial the defendant's statements to the members of the sanity board are privileged from disclosure unless the defendant offers the statements or derivative evidence at trial. Mil. R. Evid. 302; Pet. App. 11a, 23a. These safeguards are

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<sup>6</sup> Rule 703(d) provides in relevant part:

*Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which [he is] entitled under subsection (e)(2)(D) of this rule.

A defendant may also retain a private expert at his own expense. Mil. R. Evid. 706(c).

fully adequate to ensure that a military defendant's rights under *Ake* are preserved.

Petitioner's statements to Dr. Rosete were not privileged under any of those provisions. Rule 302, Mil. R. Evid., the sanity board privilege, was inapplicable because Dr. Rosete was not ordered to examine petitioner as part of a sanity board evaluation. Pet. App. 11a-12a. Rule 502(a), the military attorney-client privilege, was inapplicable because Dr. Rosete was not "employed by" petitioner pursuant to Mil. R. Evid. 706(c), and was not "assigned to assist" the defense pursuant to Rule 703(d) of the Rules for Courts-Martial. Pet. App. 12a; Mil. R. Evid. 502(b)(3).

Petitioner dismisses (Pet. 14) the procedures established by military law as nothing more than a "bureaucratic requirement to go through proper channels," but that is an unfair characterization of the military's procedures. It is eminently reasonable to require a serviceman to request the appointment of a defense expert rather than, as the Court of Military Appeals colorfully put it, to allow him to "commandeer" an expert for the defense team. Pet. App. 19a-20a.

The military employs a large number of experts, but mission requirements often dictate that a particular expert be assigned to matters other than assisting the defendant in a specific case. Requiring the defendant to ask the convening authority to appoint a defense expert therefore avoids the disruption that would occur if the defendant were allowed to select his own expert, rather than request that the expert be assigned to him. And that requirement does not unfairly restrict a defendant's right to obtain expert assistance for trial, because a serviceman has no right to select the expert of his choice at government expense. *Ake v. Oklahoma*, 470 U.S. at 83; *United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987), cert. denied, No. 87-833 (Feb. 22, 1988).

Petitioner also contends (Pet. 11) that he was entitled to believe that his statements to Dr. Rosete would be treated as confidential, for several reasons: (1) the government was aware of his consultations with Dr. Rosete and did not suggest that it would call Dr. Rosete as a witness at trial; (2) Dr. Rosete freely lent his services to petitioner in anticipation of trial; (3) defense counsel asked Dr. Rosete to keep his discussions with petitioner confidential; and (4) expert assistance was limited at the air base where petitioner was tried. None of those arguments is persuasive.

The gravamen of petitioner's argument is a challenge to the rule that the physician-patient privilege is not applicable in the military setting. The physician-patient privilege was specifically excluded from the Military Rules of Evidence because that privilege "was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel." *Manual App. 22*, at A22-35. A serviceman's physical or psychological condition may affect his ability to carry out his mission requirements, and it has historically been the duty of medical officers to make periodic examinations of servicemen and to make such examinations when directed to do so as may be necessary to ensure that a serviceman is fit for duty. See *Manual for Courts-Martial, United States*, 1969 para. 151c(2) (rev. ed.). In addition, a military commander must always be aware of his subordinates' fitness for duty in order to ensure that the unit's mission, as well as the lives of its members, are not put at risk. The military, accordingly, has a clear and powerful interest in ensuring that a physician (particularly a military physician) can supply necessary medical information to a serviceman's superiors. Given the longstanding rule that there is no physician-patient privilege in the military, peti-

tioner cannot claim that he was surprised to learn that his discussions with Dr. Rosete were not privileged.<sup>7</sup>

The other arguments petitioner offers are also unpersuasive. The fact that Dr. Rosete, a captain in the Air Force, freely lent his services to petitioner and the fact that defense counsel asked Dr. Rosete for a promise of confidentiality are irrelevant, because neither defense counsel nor Dr. Rosete was authorized to create a privilege that did not otherwise exist. Moreover, even if there were no other psychological experts at the air base where petitioner's trial was held (a proposition that petitioner did not attempt to establish at trial), a psychological expert from some other military facility in Japan could have been appointed to assist in petitioner's defense. In sum, there is no merit to petitioner's assertion (Pet. 13) that he reasonably relied on Dr. Rosete's promise of confidentiality and that his reliance should have been respected by excluding Dr. Rosete's testimony.<sup>8</sup>

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<sup>7</sup> The federal courts have not recognized an "attorney-psychotherapist-client" privilege under the Constitution. See *United States v. Talley*, 790 F.2d 1468, 1470-1471 (9th Cir.), cert. denied, 479 U.S. 866 (1986); *Noggle v. Marshall*, 706 F.2d 1408, 1413-1416 (6th Cir.), cert. denied, 464 U.S. 1010 (1983); *Granviel v. Estelle*, 655 F.2d 673, 682-683 (5th Cir. 1981), cert. denied, 455 U.S. 1003, 1007 (1982); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), aff'd, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958 (1977). Petitioner (Pet. 12) relies on *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975), for the proposition that the violation of the "attorney-psychotherapist-client" privilege implicates the Sixth Amendment right to the effective assistance of counsel. *Alvarez*, however, was concerned with the interpretation of a federal statute, 18 U.S.C. 3006A, and was not concerned with defining the scope of the constitutional guarantee. *Noggle*, 706 F.2d at 1413; *Granviel*, 655 F.2d at 682; *Edney*, 425 F. Supp. at 1053-1054. In addition, *Alvarez* did not involve the procedures unique to the military that protect a defendant's right to obtain expert psychiatric assistance.

<sup>8</sup> Finally, any error in admitting Dr. Rosete's testimony was harmless. The prosecution presented an overwhelming case against peti-

CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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SEPTEMBER 1988

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tioner. Kristy testified that petitioner had sexually abused her, Petty Officer Serrano caught petitioner in the act of exposing himself to Kristy, petitioner made several damning admissions during his testimony, and his version of the events was not credible. Pet. App. 10a-11a, 24a. Accordingly even if Dr. Rosete's testimony should have been excluded, its admission was harmless because it could not have materially contributed to the verdict.

